Filed 3/28/19 P. v. Domenico CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DOMENICO, Defendant and Appellant.	A153399 (Humboldt County Super. Ct. No. CR1703556)

Defendant Anthony Domenico appeals from the sentence imposed after his conviction for arson of an inhabited structure and assault with a deadly weapon other than a firearm. Defendant raises issues of trial court abuse of discretion and ineffective assistance of counsel.

We affirm.

FACTUAL BACKGROUND

T.U.,[1] the crime victim, testified at trial as follows. Defendant lived in an encampment with T.U. and a few other men in Humboldt County. The encampment area contained four tents and a 12-by-25 foot wooden structure built by T.U., which he described as his "shack." Defendant's tent was about 200 feet from T.U.'s shack. Relations between defendant and T.U. were strained and defendant frequently threatened to burn down T.U.'s shack.

[1] We refer to the victim by his initials out of respect for his privacy.

On the morning of August 18, 2017, T.U. was sleeping in his shack and awoke to defendant yelling profanities and threatening to kill him. T.U. went outside and picked up a stick as he walked to the gate of his shack. T.U. saw that his gate "was busted down," and he and defendant got into an argument. T.U. held up the stick, "pushing . . . just to keep [defendant] back." T.U. told defendant to leave him alone, turned around and dropped the stick. As T.U. was walking from his gate to his shack, Defendant struck him up to three times on the back of the head, knocking him to the ground. Defendant then "sicced his two pitbulls" on T.U. The pitbulls responded to the command by attacking each other. T.U. "realized [he] was bleeding real bad," got up and ran across the freeway to a neighbor's house to call the police. The neighbor dialed 911 for T.U. and T.U. reported the incident. T.U. then looked in the direction of his shack and saw "flames above the tree line." T.U. was taken by ambulance to the hospital, where his head wound was closed with four metal staples.

A reporter from a local news channel testified at trial that she arrived at the scene to cover the fire and interviewed defendant, who was there watching the fire burn, with audio and visual equipment. Defendant told the reporter that T.U. had set the fire. After defendant believed the cameras were no longer rolling, he stated: "I burnt the [profanity] . . . place down." He repeated the admission shortly thereafter. A patrol officer who was dispatched to the scene of the crime testified that defendant told him that he had been asleep and he denied having any knowledge of the assault.

The battalion chief for the local fire protection district testified at trial that he and a team of firefighters responded to the fire scene. Soon after they arrived, they received information that children were potentially inside the burning building and entered. In spraying down the inside of the building, six of the firefighters were splattered with fecal matter that was contained inside the building. The firefighters who were exposed to this biological hazard were forced to miss duty to undergo medical screening over several months, resulting in over $52,000 in costs incurred by the fire department. The battalion chief testified that he thought an accelerant was used to start the fire due to the rapid spread of the fire.

PROCEDURAL BACKGROUND

A jury found defendant guilty of arson of an inhabited structure or property and assault with a deadly weapon other than a firearm. (Respectively, § 451, subd. (b)[2] and (§ 245, subd. (a)(1).)

Defendant was sentenced on January 2, 2018. The trial court adopted the probation officer's sentencing recommendation and sentenced defendant to a total term of nine years in prison, comprised of an upper term sentence of eight years on the arson conviction and a consecutive term of one year (one-third of the midterm) for the assault conviction. The trial court found defendant's "insignificant record of prior criminal conduct" to be a mitigating factor and found four aggravating factors: (1) great bodily harm or other conduct disclosing a high degree of cruelty, viciousness, or callousness pursuant to California Rules of Court rule 4.421(a)(1)[3]; (2) vulnerable victim pursuant to rule 4.421(a)(3); (3) damage of great monetary value pursuant to rule 4.421(a)(9); and (4) violent conduct which indicates a serious danger to society pursuant to 4.421(b)(1). The trial court also imposed various fines and fees that are not at issue in this appeal.

Defendant timely appealed.

DISCUSSION

I. Defendant's Sentencing Claims are Forfeited

Defendant contends that his failure to raise objections to the trial court does not constitute a waiver because the sentence was legally unauthorized and, in any event, he did not have a meaningful opportunity to object.

A. Defendant was Required to Object in the Trial Court

We disagree that the sentence was an "unauthorized sentence" that did not require an objection for review on appeal. (See *People v. Anderson* (2010) 50 Cal.4th 19, 26 [" 'the "unauthorized sentence" concept constitutes a narrow exception to the general

---

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] All further rule references are to the California Rules of Court unless otherwise indicated.

requirement that only those claims properly raised and preserved by the parties are reviewable on appeal' [Citations] "].)

Defendant argues that "the trial court's impermissible dual use of facts to impose a consecutive sentence and also to select an upper term was a plain violation of rule 4.406(a), apparent on the face of the sentencing record, and does not require any factual inquiry into the sentencing proceeding itself." (See Rule 4.406(a) [prohibits "dual use of facts" in sentencing choice].) However, an unpreserved sentencing challenge may be considered on appeal in cases involving unauthorized sentences that "could not lawfully be imposed under any circumstances in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) In *Scott*, the California Supreme Court pointed out that the phrase "unlawful sentence" is defined to exclude a "court's 'choice' of the lower, upper, or middle term or consecutive terms of imprisonment." (*Ibid*.) Further, the trial court explained that a defendant forfeits on appeal any "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. [including] . . . cases in which the court purportedly erred because it double-counted a particular sentencing factor. . . ." (*Id.* at p. 353.)

Because, as will be discussed in detail in Section II, both the upper term sentence for the arson conviction and the consecutive one year term for the assault conviction were well within the discretion of the trial court, these sentences do not fall within the "unauthorized sentence" exception and defendant was required to object in the trial court.

B. Defendant had the Opportunity to Object to the Trial Court

Defendant argues that the trial court did not make its findings on aggravating circumstances until after argument was concluded, and that this "order of proceedings no doubt discouraged counsel from further argument."

In *Scott*, the court held that a criminal defendant may not raise claims on appeal "involving the trial court's failure to properly make or articulate its discretionary sentencing choices" if the party did not object to the sentence in the trial court. (*Scott*, *supra*, 9 Cal.4th at p. 353.) Sentencing challenges may not be raised for the first time on appeal unless a defendant did not have a meaningful opportunity to object during the

sentencing proceeding. (*Id.* at p. 356.) A meaningful opportunity has been defined as simply an opportunity to address the trial court regarding sentencing. (See *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84.)

At the sentencing hearing, defense counsel was invited to comment on the trial court's tentative ruling "to proceed as recommended by the county probation department" and to impose the upper term for the arson conviction and the consecutive term for the assault conviction. The probation report listed Rule 4.421(a)(9) (crime involving damage of great monetary value) and Rule 4.421(b)(1) (violent conduct that poses a serious danger to society) as "circumstances in aggravation" for the arson conviction and Rule 4.425 (consecutive sentences appropriate as crimes were two separate acts) as criteria in support of imposing a consecutive sentence. Counsel for both parties responded, "No." Defense counsel did not object to the final sentence on any grounds. Therefore, defense counsel clearly had a meaningful opportunity to object " 'during the course of the sentencing hearing itself . . . .' [Citation] " (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751.) As a result, defendant has forfeited his claims of sentencing error. (*Id.* at p. 755.)

Thus, we find that defendants' sentencing claims are forfeited for failure to object in the trial court.

II. The Trial Court's Sentencing Order was not Irrational or Arbitrary

Even if defendants' sentencing claims were not forfeited, we find that the trial court acted within its discretion in sentencing defendant to the upper term for the arson conviction and to the consecutive term for the assault conviction.

A. Standard of Review

We review a trial court's sentencing determination for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The party attacking a trial court's sentence has the burden to show that the decision was clearly irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*); see *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582 (*Avalos*) [" '[s]entencing courts have wide discretion in weighing aggravating and mitigating factors [citations] . . . . We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.' [Citation]"].) In the

absence of this showing, "the trial court is presumed to have acted to achieve legitimate sentencing objectives . . . ." (*Carmony, supra* 33 Cal.4th at pp. 376-377.)

In applying this standard, it is not our role to substitute our reasoning for that of the trial court, nor to "reweigh valid factors bearing on the decision below." (*Scott, supra,* 9 Cal.4th at p. 355; see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978 [" '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citations.]")

B. The Trial Court's Decision to Impose the Upper Term for the Arson Conviction Was Not an Abuse of Discretion

Defendant was convicted of arson of an inhabited structure under section 451, subdivision (b), which is "a felony punishable by imprisonment in the state prison for three, five, or eight years." Section 1170, subdivision (b), provides: "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court . . . . The court shall select the term, which in the court's discretion, best serves the interests of justice."

We find that that trial court appropriately applied aggravating factors to support an upper term sentence of eight years for the arson conviction. The trial court relied on the aggravating factor applicable when the defendant has engaged in violent conduct that indicates a serious danger to society and specifically referred to it before announcing the sentence. (Rule 4.421(b)(1)) The probation report, which the trial court stated it read and considered, lists Rule 4.421(b)(1) as a circumstance in aggravation for the arson conviction, explaining that "[d]efendant engaged in conduct that endangered others who were present and lived in the homeless encampment." The fire started by defendant occurred in an area with dense vegetation, where it posed a danger of spreading to the surrounding brush. Moreover, the fire was especially dangerous due to the proximity of other residents in the encampment near T.U.'s home.

That aggravating factor alone would have been enough to impose the upper term sentence. (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413 [a single factor in aggravation is sufficient to impose the upper term].) However, the trial court also relied on and specifically referred to Rule 4.421(a)(9), which provides for an aggravating factor when "[t]he crime involved an attempted or actual taking or damage of great monetary value." The probation report listed Rule 4.421(a)(9) as an aggravating circumstance for the arson conviction, explaining that the fire department suffered a "property and content loss at $52,453.00." These damages were caused when six of the firefighters were splattered with fecal matter that was contained inside the building while spraying it down. The firefighters who were exposed to the biological hazard were forced to miss duty to undergo expensive medical screening over several months, resulting in $52,453 in costs incurred by the fire department. In addition, all of T.U.'s possessions were destroyed in the fire.

Defendant contends that the trial court abused its discretion in applying this aggravating factor because "[a]ggravating sentencing factors are intended to address a defendant's culpability, not unpredictable matters of chance." Defendant cites *People v. Levitt* (1984) 156 Cal.App.3d 500, for the proposition that aggravating sentencing factors should be "based upon . . . choices which the defendant makes of his own will," and not on fortuitous circumstances. (*Id.* at 516–517.) This citation is not persuasive as the *Levitt* court found the enhancement for attempted or actual taking or damage of great monetary value inapplicable to bereavement (not monetary) damages to the victim's family. (*Ibid.*) In contrast, defendant chose to commit arson. As a predictable result, first responders from the fire department arrived and the fire department, as well as T.U., suffered monetary loss.

Thus, we find that the trial court's decision to impose the upper term for the arson conviction was not irrational or arbitrary. There is support in the record for both the Rule 4.421(b)(1) and Rule 4.421(a)(9) aggravating factors. Further, even if just one of the factors were permissible, the imposition of the upper term for arson would still be within the trial court's discretion. (See *People v. Steele* (2008) 83 Cal.App.4th 212, 226.)

C. The Trial Court's Decision to Impose a Consecutive Term for the Assault Conviction Was Not an Abuse of Discretion

A trial court has broad discretion to impose prison terms on multiple offenses concurrently or consecutively. (*People v. Clancey* (2013) 56 Cal.4th 562, 579; see *People v. Shaw* (2004) 122 Cal.App.4th 453, 458 [trial court has "broad discretion to impose consecutive sentences when a person is convicted of two or more crimes"].)

Defendant was sentenced to a consecutive term of one year (one-third of the midterm) for his assault conviction. The trial court adopted the probation report's recommendation for the consecutive term, which explained that the crimes of arson and assault "were two separate acts committed against the victim" under Rule 4.425. (Rule 4.425(a)(1), (a)(2) [criteria regarding the decision to impose consecutive rather than concurrent sentences include whether "[t]he crimes and their objectives were predominantly independent of each other" and whether the crimes "involved separate acts of violence or threats of violence"].) We agree that defendant's crimes of assault and arson were distinct; one was not contingent on the other, the objective of each crime was independent and each constituted a separate act of violence. (See *People v. Clark* (1990) 50 Cal.3d 583, 637 (*Clark*) ["arson is an act of violence that is likely to cause harm to more than one person"]; see also *People v. James* (1935) 9 Cal.App.2d 162, 163–164 [assault is an act of criminal violence].) Thus, it was appropriate for the trial court to base the consecutive sentence on the finding that the assault and arson were distinct crimes that involved separate acts of violence under Rule 4.425(a).

Under Rule 4.425(b), a trial court may also consider aggravating factors or mitigating circumstances in deciding whether to impose consecutive rather than concurrent sentences, with certain exceptions not applicable here. The trial court relied on two aggravating factors to support the consecutive term for the separate violent crime of assault: (1) that it was a crime involving a "high degree of cruelty, viciousness or, callousness" under Rule 4.421(a)(1); and (2) that T.U. was "particularly vulnerable" under Rule 4.421(a)(3).

First, defendant contends that the trial court's consideration of the "cruelty, viciousness and/or callousness aggravating factor was improper because the fact was inherent in the assault itself." This argument ignores a record that includes defendant's repeated use of a homophobic slur, that he struck T.U. from behind up to three times on his own property, and that defendant commanded his two pit bulls to attack T.U. We conclude that these facts, which are supplementary to the elements of the crime of assault, properly support a finding that defendant's conduct constituted a "high degree of cruelty, viciousness, or callousness" within the meaning of Rule 4.421(a)(1).

The trial court also relied on the particularly vulnerable victim factor. This factor was suggested by the People on the basis of T.U.'s testimony that he was unarmed and had turned his back on defendant to retreat to his home when he was struck on the back of the head. A "particularly vulnerable" victim under Rule 4.421(a)(3) is one who is vulnerable " 'in a special or unusual degree, to an extent greater than in other cases [and is] defenseless, unguarded, unprotected, accessible, assailable . . . susceptible to the defendant's criminal act.' [Citation]" (*Clark, supra,* 50 Cal.3d at p. 638.)

Based on our review of the record, we conclude that the trial court erred in finding T.U. to be a particularly vulnerable victim as T.U., an adult, was in no way vulnerable by virtue of his innate characteristics or condition at the time of the assault. (See *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007 [victim was particularly vulnerable when multiple shots were fired at him while he was sleeping]; *People v. Bishop* (1984) 158 Cal.App.3d 373, 378–379 [victims were young and physically weak].) The fact that T.U. had turned away from defendant during the altercation and then was struck does not demonstrate that he was *particularly* vulnerable in a way that would make him more vulnerable in a " 'special or unusual degree, to an extent greater than' " other victims of an assault. (*Clark, supra,* 50 Cal.3d at p. 638; see also *People v. Bloom,* 142 Cal.App.3d 310, 322 ["it is precisely because [victims of drunk driving] are *all* vulnerable that [defendant] cannot be considered to be vulnerable 'in a special or unusual degree, to an extent greater than in other cases.' "] (italics in original).)

Setting aside the vulnerable victim aggravating factor, the trial court's imposition of a consecutive sentence was still well within its discretion because, as discussed above, under Rule 4.425, consecutive sentencing is appropriate if the "crimes and their objectives were predominately independent of each other," or if they "involved separate acts of violence." (Rule 4.425(a)(1) and (a)(2).) Further, the record supports the trial court's finding of an aggravated factor for conduct involving a "high degree of cruelty, viciousness, or callousness" within the meaning of Rule 4.421(a)(1). Only one aggravating factor is required to impose consecutive terms. (*People v. Osband* (1996) 13 Cal.4th 622, 728–729.)

Thus, we find that the trial court's imposition of the consecutive one year term for the assault conviction was not arbitrary or irrational. Given the multiple reasons for the consecutive sentence and the trial court's overall analysis, we do not remand for a clarified statement of reasons as there is no real probability that the trial court would have chosen a lesser sentence absent the vulnerable victim aggravating factor. (See *People v. Williams* (1996) 46 Cal.App.4th 1767, 1783 [order of remand is not warranted where it would be "no more than an idle act"].)

D. The Trial Court Did Not Make Improper Dual Use of the Assault Conviction or Use the Assault Conviction to Aggravate the Arson Term

Defendant argues that the trial court made improper "dual use" of defendant's assault conviction by using it as a basis for its upper term sentence for the arson conviction. (Rule 4.406(a); *People v. Price* (1984) 151 Cal.App.3d 803, 815 [court may not use the same fact to impose both an upper term and a consecutive sentence].) Defendant also makes a related argument that the trial court improperly used essential characteristics of his conviction for assault to aggravate his arson sentence. These arguments are unsupported by the record.

The trial court listed four factors in aggravation before stating its sentences on the two convictions. (See *People v. Rocha* (1996) 48 Cal.App.4th 1060, 1071 [while a court must state its reasons for a sentence choice, it is not required to use any particular form in doing so].)

However, as explained in Section II.B, the trial court's statements at the sentencing hearing and its reliance on the probation report demonstrate that it based the upper term sentence for the arson conviction on: (1) the aggravating factors under Rule 4.421(b)(1) (serious danger to society); and (2) Rule 4.421(a)(9) (great financial loss). Rule 4.421(b)(1) was listed as an aggravating factor for the arson conviction in the probation report with the statement that "[d]efendant engaged in conduct that endangered others who were present and lived in the homeless encampment." The trial court stated that the Rule 4.421(a)(9) aggravating factor "takes into consideration the losses sustained by the fire department."

The record does not support defendant's arguments that the trial court used either the assault conviction itself, or any "essential characteristic" of the assault conviction, to support the upper term sentence for the arson conviction. Even if the trial court had improperly used some element of the assault conviction to support the upper term arson sentence, it would not render the sentence irrational or arbitrary because the sentence would still be supported by the aggravating factors under Rules 4.421(a)(9) and 4.421(b)(1). Just one of these factors would be enough to support the trial court's imposition of an upper term sentence for the arson conviction. (*Quintanilla*, *supra*, 170 Cal.App.4 at p. 413.)

E. The Trial Court Did Not Improperly Disregard Defendant's Alcohol and Drug Use As a Mitigating Factor

Defendant argues that the trial court failed to consider defendant's alcohol and drug addiction as a mitigating circumstance. Rule 4.423(b)(2) lists as a mitigating circumstance that "[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime." (See *In re Spears* (1984) 157 Cal.App.3d 1203, 1213 [substance abuse recognized as a possible mitigating factor as "a disease affecting its victim's volitional capabilities. . . ."].)

The probation report, which had been read and considered by the trial court, contained a summary of defendant's substance abuse: defendant stated he had "never been a big drinker"; had smoked marijuana regularly, but recently only when he had it;

had used methamphetamine one or twice per week prior to his incarceration; and had occasionally used other drugs. The report also stated that "[d]efendant said his alcohol and drug use have never really affected his life. He further said his current situation has nothing to do with alcohol or drugs." The responding patrol deputy testified at trial that defendant appeared intoxicated at the time of the crime.

We find nothing in the record to suggest that defendant had an alcohol or drug problem that would qualify as a "mental or physical condition that significantly reduced [defendant's] culpability for the crime." (Rule 4.423(b)(2).) The sentencing court is free to minimize or disregard altogether an arguably mitigating factor and need not set forth its reasons for rejecting one. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; see also *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317–1318 ("[t]he trial court is not required to set forth its reasons for rejecting a mitigating factor. [Citation] . . . . unless the record affirmatively indicated otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors"].) Thus, we find that defendant's argument that the trial court abused its discretion by not finding defendant's alcohol and drug use as a mitigating factor is without merit.

III. Counsel's Failure to Object Does Not Establish Ineffective Assistance of Counsel

Defendant contends that we should review his sentencing claims because defense counsel was "constitutionally ineffective." He argues that "there could be no tactical reason for failing to object to the trial court's improper findings of aggravating factors or to point out the existence of an additional mitigating factor."

To prevail on a claim of ineffective counsel, a defendant must show deficient performance and that, but for such deficiency, a reasonable probability exists that he or she would have achieved a more favorable result. (*In re Jackson* (1992) 3 Cal.4th 578, 601, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.) "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' [Citation.] A court considering a claim of ineffective assistance must apply a 'strong presumption'

that counsel's representation was within the 'wide range' of reasonable professional assistance. [Citation.] The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by defendant by the Sixth Amendment.' [Citation.]" *(Harrington v. Richter* (2011) 562 U.S. 86, 104.) Scrutiny of counsel's actions must be highly deferential, and the reviewing court must make every effort to remove the "distorting effects of hindsight." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) On appeal, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Id.* at p. 690.)

As explained in Section II, defendant cannot demonstrate that the trial court's imposition of the upper term sentence for arson or the consecutive sentence for assault was an abuse of discretion. Thus, we reject his contentions that he was denied effective assistance of counsel for failure to object to these sentencing decisions as the failure to object on non-meritorious grounds does not constitute deficient performance. (*See People v. Lucero* (2000) 23 Cal.4th 692, 732 [" '[c]ounsel may not be deemed incompetent for failure to make meritless objections' [Citation] "].)

We find that defendant's claim of ineffective assistance of counsel is without merit as counsel's failure to object to the sentence was neither evidence of deficient performance nor was it prejudicial.

DISPOSITION

The judgment is affirmed.

_____
Petrou, J.

WE CONCUR:

_____
Siggins, P.J.

_____
Wiseman, J.[*]

People v. Domenico/A153399

[*] Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.